**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**

**2011 MSPB 17**

Docket No. CH-0752-10-0204-I-2

**Pamela Ann Doran,**

**Appellant,**

**v.**

**Department of the Treasury,**

**Agency.**

February 9, 2011

James Nevels, Overland Park, Kansas, for the appellant.

Donna McNamara, Esquire, Dallas, Texas, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

## OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that affirmed her removal. For the following reasons, we GRANT the petition for review, VACATE the initial decision, and REMAND the case for adjudication of the appellant's affirmative defenses of discrimination and reprisal for whistleblowing.

## BACKGROUND

¶2 The agency's Internal Revenue Service removed the appellant from her GS-7 Tax Examining Technician position based on charges of absence without leave

(AWOL) and failing to comply with the agency's leave policy by either failing to timely provide medical documentation to cover her absences or failing to contact her manager to obtain approval for her absences. Initial Appeal File (IAF), Tab 4, Subtabs 4a, 4b, 4d. On appeal to the Board, the appellant alleged that she turned in all documentation that was required in a timely manner; she also checked the boxes on her appeal form indicating that she was raising, among other things, claims of prohibited discrimination and whistleblower reprisal. IAF, Tab 1 at 4, 6. In this regard, she checked the boxes on her appeal form indicating that the agency discriminated against her based on her marital status or political affiliation and disability, and alleged that she was a target for her manager because she "had question[ed] . . . things she did and other[] employee[s] [were] scare[d] to voice their" opinions. *Id*. at 7-8.[*]

¶3 The administrative judge issued a standard acknowledgment order informing the appellant that the Board would assert jurisdiction over her claim of reprisal for whistleblowing and that she was required to make a nonfrivolous allegation that she made one or more whistleblowing disclosures and that the disclosures were a contributing factor in the removal action. IAF, Tabs 2, 3. In its response to the appeal, the agency asserted that the appellant provided no factual allegations to support her discrimination claims and argued that the appellant's whistleblower claim was without merit. IAF, Tab 4, Subtab 1 at 3-9. Citing several Board cases, the agency indicated that to prevail in a whistleblower case the appellant had to have engaged in whistleblowing activity by making a protected disclosure as described in 5 U.S.C. § 2302(b)(8) and show that the disclosure was a contributing factor in the agency's decision. *Id*. at 5-8. The

[*] The appellant requested a stay of her removal in connection with her claim of whistleblower reprisal. Stay File, Tab 1 at 13-14. The administrative judge denied that request, finding that the appellant did not make a nonfrivolous claim that she made a protected disclosure under the Whistleblower Protection Act. Stay File, Tab 2 at 2-3.

administrative judge then dismissed the appeal without prejudice due to a witness's inability to attend the scheduled hearing. IAF, Tab 9.

¶4 Upon timely refiling her appeal, the appellant asserted that certain agency managers "continue[d] the retaliation agai[n]st me & others," and that the action was based on disability discrimination. MSPB Docket No. CH-0752-10-0204-I-2 (IAF-2), Tab 1, Tab 6 at 2, 5. The appellant also noted that she was a target for her supervisor because she questioned things her supervisor did and other employees were scared to voice their opinions or go to the union. IAF-2, Tab 6 at 5. In its prehearing submissions, the agency identified the issues as including, among other things, whether the removal action constituted prohibited discrimination on the basis of marital status, political affiliation, or disability, whether the appellant made protected whistleblower disclosures, and whether any disclosure was a contributing factor in the removal. IAF-2, Tab 2 at 2-3, Tab 5 at 2-3.

¶5 After a prehearing conference, the administrative judge noted that the appellant "is challenging the merit[s] of the agency's case in chief and did not raise any affirmative defenses." IAF-2, Tab 8 at 1. The administrative judge noted that any correction to his summary of the conference had to be entered into the record no later than the start of hearing. *Id*. at 2. Neither party, however, filed such a correction. After the hearing, the administrative judge affirmed the removal action, finding that the agency proved its charges, the action promoted the efficiency of the service, and the penalty was reasonable. IAF-2, Tab 9.

¶6 On review, the appellant asserts that her supervisor improperly submitted AWOL charges for 2 days in May 2007, because the appellant had approved annual leave during that time, and that her supervisor, who was a former friend with whom she "fell out," retaliated against her "from the fi[r]st day." Petition for Review File, Tab 3 at 2. The appellant asserts that she wanted "to be able to present evidence to prove that [she] was retaliated against by [her] manager." *Id*. at 5. The appellant also claims that although the parties agreed at the hearing that

"2007 wouldn't be used," all of the AWOL charges came from 2007, when she was in a non-pay status, and those charges should have been dropped when she presented the agency with "documentation." *Id*. at 5-6.

## ANALYSIS

¶7 The appellant has failed to present persuasive evidence or argument that would warrant disturbing the administrative judge's decision regarding the merits of the agency's charges. Although the appellant appears to contest certain AWOL charges dating from 2007, the specifications underlying the agency's charges all relate to misconduct that occurred in 2008 and 2009, not 2007. *See* IAF, Tab 4, Subtab 4d at 1-2. To the extent that the appellant's allegations regarding the 2007 events may be a challenge to prior discipline imposed by the agency in November 2007, the record indicates that the appellant was informed of that action in writing, the action was a matter of record, and the appellant was permitted to dispute the charges before a higher level of authority than the one that imposed the discipline; there is also no indication that the 2007 action was clearly erroneous. IAF, Tab 4, Subtab 4e at 27-28, Subtab 4i; *see Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981).

¶8 As previously explained, the appellant alleged below that the agency's action was based on marital status or political affiliation discrimination, disability discrimination, and whistleblower reprisal; she continues to allege on review that her supervisor retaliated against her. Generally, the Board has held that an appellant is deemed to have abandoned a discrimination claim or other affirmative defense if it is not included in the list of issues in a prehearing conference summary and the party was afforded an opportunity to object to the conference summary. *Wynn v. U.S. Postal Service*, 115 M.S.P.R. 146, ¶ 9 (2010).

¶9 Nevertheless, when an appellant raises an affirmative defense in an appeal either by checking the appropriate box in an appeal form, identifying an affirmative defense by name, such as "race discrimination," "harmful procedural

error," etc., or by alleging facts that reasonably raise such an affirmative defense, the administrative judge must address the affirmative defense(s) in any close of record order or prehearing conference summary and order. *Id.*, ¶ 10. If an appellant expresses the intention to withdraw such an affirmative defense, in the close of record order or prehearing conference order the administrative judge must, at a minimum, identify the affirmative defense, explain that the Board will no longer consider it when deciding the appeal, and give the appellant an opportunity to object to withdrawal of the affirmative defense. *Id.*

¶10 The administrative judge adjudicated this case and issued an initial decision before the Board issued its November 2, 2010 decision in *Wynn*, which set forth the above requirement for the first time. Although the administrative judge's actions may have been proper at the time of the initial decision, the Board has held that it will apply the law in effect when a petition for review is pending before the Board. *See Social Security Administration v. Harty*, 96 M.S.P.R. 65, ¶ 20 n.2, *review dismissed*, 117 F. App'x 733 (Fed. Cir. 2004); *Johnson v. Department of Defense*, 95 M.S.P.R. 192, ¶ 6 (2003), *aff'd*, 97 F. App'x 325 (Fed. Cir. 2004). There is no indication in the record that the administrative judge addressed in a close of record or prehearing conference summary and order the affirmative defenses raised by the appellant. Thus, we apply *Wynn* under these circumstances and find that the record does not establish that the appellant withdrew or abandoned the affirmative defenses she raised below.

¶11 In the absence of evidence establishing that the appellant had withdrawn or abandoned her affirmative defenses, the administrative judge should have advised the appellant of the applicable burdens of proving her particular affirmative defenses, as well as the kind of evidence she was required to produce to meet her burden. *See Wynn*, 115 M.S.P.R. 146, ¶ 10. Here, neither the administrative judge nor the agency provided the appellant with such information relating to her discrimination claims. *See Mahaffey v. Department of Agriculture*, 105 M.S.P.R. 347, ¶ 11 (2007) (remand was unnecessary, in part, because the agency's

submissions put the appellant on notice of the correct burden and elements of proof necessary to establish his claims). In addition, the appellant was not provided with complete information regarding her whistleblower claim.

## ORDER

¶12 Accordingly, we VACATE the initial decision and REMAND the appeal for adjudication of the appellant's affirmative defenses. On remand, the administrative judge shall apprise the appellant of the applicable burdens and elements of proof on her claims of discrimination and reprisal for whistleblowing. Further, the administrative judge shall afford the appellant an opportunity for discovery on her affirmative defenses and a supplemental hearing on those affirmative defenses if she requests one. The administrative judge shall then issue a new initial decision making appropriate findings regarding the charges, nexus, and the penalty, and also specifically addressing the appellant's affirmative defenses. *See Wynn*, 115 M.S.P.R. 146, ¶ 14.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.